

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 736

INTRODUCER: Judiciary Committee; Regulated Industries Committee; and Senators Stargel and Detert

SUBJECT: Residential Properties

DATE: April 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 736 revises requirements for estoppel certificates for condominium, cooperative, and homeowners' associations. When an ownership interest in a condominium unit, cooperative unit, or parcel in a homeowners' association is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a condominium or homeowners' association. Unpaid assessments may also become a lien on the property. To protect against undisclosed financial obligations and to transfer title that is free of any lien or encumbrance, buyers may request that the seller provide an estoppel certificate from the condominium, cooperative, or homeowners' association. An estoppel certificate certifies the amount of any total debt owed to the association for unpaid monetary obligations by a unit or parcel owner as of a specified date.

The bill:

- Reduces the period of time in which an association must respond to a request for an estoppel certificate from 15 days to 10 business days;
- Requires that estoppel certificates be delivered by mail, hand, or electronic means, be dated as of the date it is issued, and be valid for 30 days or 35 days if mailed;
- Requires that estoppel certificates contain the date of issuance, all assessments and other moneys owed to the association by the unit owner, as reflected in the official records of the association, through at least 30 days after the date the estoppel certificate is issued or 35 days if mailed;
- Requires that estoppel certificates contain the amount of any fee charged for preparing and delivering the certificate as well as the signature of an officer or agent of the association;

- Provides that an association waives the right to collect any moneys owed in excess of the amounts set forth in the estoppel certificate from any person and his or her successors and assigns who in good faith rely upon the certificate;
- Establishes fee caps for the preparation of estoppel certificates which range from \$250 to \$450; and
- Provides that the fee for an estoppel certificate is the obligation of the unit owner if the closing does not occur within 60 days after the estoppel certificate is issued.

For cooperative associations, the bill authorizes the cooperative associations to charge a fee for the estoppel certificate if the fee is established by a written resolution adopted by the board or provided by a written management, book, keeping, or maintenance contract. This provision is comparable to authority provided to condominium and homeowners' associations.

II. Present Situation:

Condominium

A condominium is a “form of ownership of real property created pursuant to [ch. 718, F.S.,] which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.”¹ A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.² A declaration is like a constitution in that it:

creates the condominium and ‘strictly governs the relationships among the condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.’³

A declaration “may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.”⁴ A declaration of condominium may be amended as provided in the declaration.⁵ If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of the owners of not less than two-thirds of the units.⁶ Condominiums are administered by a board of directors referred to as a “board of administration.”⁷

Section 718.103(3), F.S., defines the term “association property” to mean:

that property, real and personal, which is owned or leased by, or is dedicated by a recorded plat to, the association for the use and benefit of its members.

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

⁴ Section 718.104(5), F.S.

⁵ See s. 718.110(1)(a), F.S.

⁶ Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.

⁷ Section 718.103(4), F.S.

Section 718.103(8), F.S., defines the term “common elements” to mean the portions of the condominium property not included in the units.

Section 718.103(13), F.S., defines the term “condominium property” to mean:

the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

Section 718.103(16), F.S., defines a developer as one “who creates a condominium or offers condominium [units] for sale or lease in the ordinary course of business” There are two classes of developers: those who create the condominium by executing and recording the condominium documents and those who offer condominium units for sale or lease in the ordinary course of business. Current law excludes a bulk assignee and a bulk buyer from the definition of developer.

Cooperative Associations

Section 719.103(12), F.S., defines a “cooperative” to mean:

that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit’s occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.⁸

Homeowners’ Associations

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners’ associations. These laws protect the rights of association members without unduly impairing the ability of the associations to perform their functions.⁹

A “homeowners’ association” is defined as a “Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.”¹⁰ Unless specifically stated to the contrary, homeowners’

⁸ See ss. 719.106(1)(g) and 719.107, F.S.

⁹ See s. 720.302(1), F.S.

¹⁰ Section 720.301(9), F.S.

associations are also governed by ch. 607, F.S., relating to for-profit corporations or by ch. 617, F.S., relating to not-for-profit corporations.¹¹

Homeowners' associations are administered by a board of directors whose members are elected.¹² The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.¹³

Assessments and Foreclosures

The liability provisions in condominium, cooperative, and homeowners' associations for unpaid assessments for present and previous unit and parcel owners are comparable.

Section 718.103(1), F.S., defines the term "assessment" to mean "a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner."¹⁴

"Special assessment" is defined to mean "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."¹⁵

An owner is jointly and severally liable with the previous owner for all unpaid assessments that come due up to the time of transfer of title.¹⁶ This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.¹⁷

In a condominium association, if a first mortgagee, (e.g., the mortgage lending bank) or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt, whichever is less.¹⁸ However, this limitation applies only if the first mortgagee joined the association as a defendant in the foreclosure action.¹⁹ This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding.

¹¹ Section 720.302(5), F.S.

¹² See ss. 720.303 and 720.307, F.S.

¹³ See ss. 720.301 and 720.303, F.S.

¹⁴ See also s. 719.103(1), F.S., for a comparable definition of "assessment" in a cooperative association, and s. 720.301(1), F.S., for a comparable definition of "assessment" in a homeowners' association.

¹⁵ Section 718.103(24), F.S.; see also s. 719.103(23), F.S., for a comparable definition of "assessment" in a cooperative association,

¹⁶ Section 718.116(1)(a), F.S., s. 719.108(1), F.S., and s. 720.3085(2)(b), F.S.

¹⁷ *Id.* The term "without prejudice" means "without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." BLACK'S LAW DICTIONARY 770 (2d pocket ed. 2001).

¹⁸ Sections 718.116(1)(b), F.S.

¹⁹ *Id.*

Section 720.3085(2), F.S., provides a comparable limitation of liability relating to parcels in homeowners' associations. Chapter 719, F.S., does not provide a comparable provision for cooperative associations.

Regarding the accrual of interest on unpaid assessments in condominium, cooperative, and homeowners' associations, unpaid assessments and installments on assessments accrue interest at the rate provided in the governing documents from the due date until paid. The rate may not exceed the rate allowed by law.²⁰ If no rate is specified in the declaration, the interest accrues at the rate of 18 percent per year. The association may also charge an administrative late fee of up to the greater of \$25 or 5 percent of each installment of the assessment for each delinquent installment for which the payment is late. Payments are applied first to the interest accrued, then the administrative late fee, then to any reasonable costs and attorney fees incurred in collection, and then to the delinquent assessment.²¹

Estoppel Certificates

A community association is required to keep accounting records for the association and separate accounting records.²² All accounting records must be kept for at least 7 years. The accounting records must be accurate, itemized, and detailed records of all receipts and expenditures. They must contain a current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid on the account, and the balance due.²³

Within 15 days after receiving a written request from an owner or his or her designee, or a mortgagee or his or her designee, the association is required to provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the owner with respect to the unit or parcel.²⁴

The certificate protects any person other than the owner who relies upon it.²⁵

The authority to charge a fee for the certificate must be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract. The fee is payable upon the preparation of the certificate.

In a condominium or homeowners' association, if the certificate is requested in conjunction with the sale or mortgage of a unit but the closing does not occur, the preparer of the certificate must refund the fee to a payor that is not a unit-owner within 30 days after receipt of the request for refund. A written request for a refund must be made no later than 30 days after the closing date

²⁰ Section 687.02(1), F.S., prohibits as usurious interest rates that are higher than the equivalent of 18 percent per annum simple interest.

²¹ See s. 718.116(3), F.S., s. 719.108(3), F.S., and s. 720.3085(3), F.S.

²² Section 718.111(12)(a)11, s. 719.104(2)(a)9, F.S., and s. 720.303.(4)(j), F.S.

²³ *Id.*

²⁴ Section 718.116(8), F.S., s. 719.108(6), F.S., and s. 720.30851, F.S.

²⁵ Section 718.116(8)(a), F.S., s. 719.108(6), F.S., and s. 720.30851(1), F.S.

for which the certificate was sought and include reasonable documentation that the sale did not occur.²⁶

The refund is the obligation of the owner, and the association may collect it from that owner in the same manner as an assessment.²⁷

After a series of public meetings in 2014, the Community Association Living Study Council,²⁸ by unanimous vote, made the following recommendations to the Legislature:

- That a reasonable cap be established for estoppel certificate fees and that such fees be tiered;
- The amount of the fee should depend on whether or not the owner is current in fees, delinquent in fees, or if it is a bulk purchase.²⁹

A condominium unit or parcel owner in a homeowners' association may compel compliance with the provisions governing the issuance of an estoppel certificate from a homeowners' or condominium association by bringing a summary procedure pursuant to s. 51.011, F.S.³⁰ The prevailing party is entitled to recover reasonable attorney fees.³¹ Current law does not provide a comparable provision for cooperative associations.

Cooperatives - Estoppel Certificates

Section 719.108(6), F.S., F.S., provides that, within 15 days after request by a unit owner or mortgagee, the association is required to provide a certificate stating all assessments and other moneys owed to the association by the unit owner with respect to the cooperative parcel. It provides that "any person other than the unit owner who relies upon such certificate shall be protected thereby." It permits the association or its authorized agent to charge a reasonable fee for the preparation of the certificate.

²⁶ Section 718.116(8)(d), F.S., and s. 720.30851(3), F.S.

²⁷ Section 718.116(8)(d), F.S., and s. 720.30851(3), F.S.

²⁸ The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of 7 members appointed by the President of the Senate, the Speaker of the House of Representatives, and the Governor. An ex officio nonvoting member was appointed by the Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes. The Council was abolished by the Legislature in 2014. *See* ch. 2014-133, s. 12, Laws of Fla.

²⁹ *See* Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridialicense.com/dbpr/lsc/documents/2014CALSCReport.pdf>.

³⁰ Sections 718.116(8)(b) and 720.30851(2), F.S.; Section 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery and the procedure also provides for an immediate trial, if requested.

³¹ *Id.*

III. Effect of Proposed Changes:

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to revise the requirements for estoppel certificates issued by condominium, cooperative, and homeowners' associations, respectively.

Form and Delivery of Estoppel Certificates

The bill:

- Reduces the period of time in which an association must respond to a request for an estoppel certificate from 15 days to 10 *business* days;
- Requires that estoppel certificates be delivered by mail, hand, or electronic means, be dated as of the date issued, and be valid for 30 days or 35 days if mailed;
- Requires that estoppel certificates contain the date of issuance, all assessments and other moneys owed to the association by the unit owner, as reflected in the official records of the association, through at least 30 days after the date the estoppel certificate is issued or 35 days if mailed;
- Requires that estoppel certificates contain the amount of any fee charged for preparing and delivering the certificate as well as the signature of an officer or agent of the association;
- Provides that an association waives the right to collect any moneys owed in excess of the amounts set forth in the estoppel certificate from any person and his or her successors and assigns who in good faith rely upon the certificate;
- Provides that payment of the fee for an estoppel certificate is the obligation of the unit owner if the closing does not occur within 60 days after the estoppel certificate is issued.

Fee Caps

An association is authorized to charge a fee for preparing an estoppel certificate, but the fee may not exceed its reasonable costs to prepare and deliver the certificate. The fee may not exceed \$250 if no delinquent amounts are owed to the association for the applicable unit on the date the certificate is issued. If delinquent amounts are owed, an additional fee for the certificate may not exceed \$100.

When an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional \$100 fee.

If an estoppel certificate is issued more than 10 business days after an association receives the request for the certificate, the association may not charge a fee for the certificate.

Allocation of Fees

The bill provides that when an estoppel certificate is requested in conjunction with the sale or refinancing of a unit or parcel, the certificate fee will be paid to the association from the closing or settlement proceeds. However, if the closing does not occur within 60 days after the certificate is issued, the fee for the certificate is the obligation of the unit owner. This 60 day period for a closing is an increase from the existing 30 day closing period in current law. The association is then authorized to collect the fee in the same manner that it would collect an assessment against

the unit. The association may not require the payment of any other fees as a condition for preparing or delivering the estoppel certificate.

The bill creates s. 719.108(6)(f), F.S., to authorize a cooperative association to charge a fee for the estoppel certificate if the fee is established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract. This provision is comparable to authority provided to condominium and homeowners' associations in ss. 718.116(8)(d) and 720.30851(3), F.S., respectively.

Effective Date

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill authorizes cooperative associations to charge a fee for the estoppel certificate if the fee is established by a written resolution adopted by the board or provided by a written management, book, keeping, or maintenance contract.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 718.116, 719.108 and 720.30851.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 7, 2015:

The committee substitute differs from the previous committee substitute by:

- Permitting an electronic request, in addition to a written request, for an estoppel certificate;
- Reducing the time in which an association must respond to a request for an estoppel certificate from 15 days to 10 business days;
- Requiring that the estoppel certificate be dated as of the date it is issued, not delivered;
- Requiring an estoppel certificate to be effective for an additional 5 days if it is mailed;
- Specifying the criteria that must be contained in an estoppel certificate;
- Deleting a provision that would have required an association to waive a claim for a lien or amounts owed to the association by someone who would have relied on the certificate if, upon receiving a written request for an estoppel certificate, the association failed to deliver the certificate; and
- Specifying fee caps that may be charged by an association.

CS by Regulated Industries on March 24, 2015:

The committee substitute (CS):

- Amends s. 719.108(6), F.S., to provide for the issuance of estoppel certificates by cooperative associations in the same manner as provided in the bill for condominium and homeowners' associations;
- Amends ss. 718.116(8) and 720.30851, F.S., to provide that the moneys owed are as reflected in the records maintained pursuant to ss. 718.111(12) and 720.303 (4), F.S., respectively;
- Amends s. 718.116(8)(a) and (b), F.S., and s. 720.30851(1), F.S., to provide that any waiver of claim extends to the successor and assigns of any person who in good faith relied on an estoppel certificate;
- Does not amend ss. 718.116(8)(b) and 720.30851(2), F.S., to provide that the waiver includes any claim for its lien against the unit or parcel, and any moneys owed to the association by the unit owner or parcel owner with respect to the unit or parcel for 40 days after the date of receipt of the request;

- Amends ss. 718.116(8)(c) and 720.30851(3), F.S., to decrease the time from 120 days to 60 days after the delivery of the estoppel certificate for the sale to occur in order for the unit or parcel owner not to be obligated to pay the fee for the estoppel certificate if the sale does not occur;
- Does not amend ss. 718.116(8)(c) and 720.30851(3), F.S., to provide a maximum fee of \$100 for the preparation and delivery of an estoppel certificate, and maximum fees of up to \$50 for specified events;
- Does not create ss. 718.116(8)(d) and 720.30851(4), F.S., to provide maximum fee amounts for simultaneous requests for the estoppel certificate for multiple units owned by the unit or parcel owner when there are no past due monetary obligations; and
- Creates s. 718.108(6)(d), F.S., to authorize the cooperative association to charge a fee for the estoppel certificate if the fee is established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract.

B. Amendments:

None.